In the Supreme Court of the United States

OCTOBER TERM 1976

CASE NO. 76-1440

ALEX GOLDSTEIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (cont.)

OTHER CITATIONS

in the

Supreme Court

of the

United States

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Petitioner, ALEX GOLDSTEIN, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-styled case on February 2, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals, printed in Appendix A hereto, infra (pp. A1 - A9) is reported at _____F.2d_____ (5th Cir. 1977).

JURISDICTION

The judgment of the Court of Appeals was entered on February 2, 1977, Appendix A, *infra* (p. A10). A timely petition for rehearing was denied on March 17, 1977. Appendix B, *infra* (p. A11-12). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Rule 22, *Rules of the United States Supreme Court.*

QUESTIONS PRESENTED

1. Whether the trial court erred to the substantial prejudice of the Petitioner and denied him due process and equal protection of the law and the right to compulsory process over witnesses when in a conspiracy and a 41 count mail fraud prosecution it denied Petitioner's trial motion to depose two crucial defense witnesses whose testimony was demonstrably material to rebutting the conspiracy alleged against the Petitioner, and the conspiracy was the only charge of which the Petitioner was convicted?

2. Whether the trial court erred to the substantial prejudice of the Petitioner and denied him due process of law and a fair trial when it permitted the government to argue and comment in summation, over objection, that the defendant failed to testify which, when considered *in tandum* with the trial court's refusal to allow the trial depositions of the two defense witnesses pertinent to the conspiracy allegation, compounded Petitioner's disability to rebut the conspiracy charge or present an effective defense?

STATUTES INVOLVED

The Federal statutory provisions involved, 18 U.S.C. 371 and 1341, are set forth in Appendix C and D, *infra* (pp. A13 - A14). Rule 15(a) is printed in Appendix E.

STATEMENT OF FACTS

This is a prosecution under statutes familiarly known as the Mail Fraud Statute, 18 U.S.C. 1341, and the conspiracy statute, 18 U.S.C. 371. Petitioner was indicted and tried in a 42 count indictment with several other defendants for conspiracy to devise and the devising and execution of a scheme to defraud by use of the United States mails. The trial was held in the United States District Court for the Southern District of Florida (Fulton, D.J.). Petitioner and three other defendants were found guilty, although Petitioner was convicted only of the conspiracy charge and was acquitted of all of the numerous substantive charges. Petitioner was sentenced to imprisonment for a term of two (2) years. Of the other convicted defendants, two received a five (5) year prison term and the remaining defendant, who did not appeal, a term of probation.

On appeal, the United States Court of Appeals for the Fifth Circuit affirmed the convictions of all appealing defendants. See A1 - A9. The Court (Gewin, Gee and Fay, JJ.) concluded that there was no demonstrable abuse of discretion in the trial court's denial of (a) Petitioner's trial *Rule 15 (a)* motion for court authorization to depose two foreign — national defense witnesses and (b) although the prosecutor's comments specifically and exclusively named the Petitioner as the party who "remained silent"

or "failed to testify" the prosecutor's remarks amounted to a comment on the failure of the defense, not the defendant, to testify.

The indictment charged a conspiracy well over a three year duration and, as it pertained to Petitioner, from January 1, 1970 until February 1, 1971. The conspiracy alleged had as its object the devising and perpetration of a complicated, international scheme to defraud investors emanating from a shell company called First Liberty Fund, a sham operated by a now notorious swindler, Phillip Morrel Wilson.

Wilson and another unindicted co-conspirator, Jack Axelrod created the image of a mutual fund which, in reality, was worthless and penniless. Both the sham fund and its "management company" were established in the Bahamas and swindled unwary investors through a series of world-wide inter-related and connecting companies which also, in reality, were worthless shams. (See Tr. 70-80; 89-90; 1851-1900; 2081; 2137-2139).

In order to assist them in that portion of their scheme to swindle European investors, the originators of the fraud obtained the assistance of another swindle, Transcontinental Casualty Insurance Company, Ltd., to verify the worth of the fund shares by "insuring" the purchased stock. Eventually, the initiators of the swindle came in contact with a German brokerage house called Northern United States Investors (NUSI) owned by the brothers, Volker and Jurgen Reible, and the Petitioner who was a securities advisor and salesman.

The first business contact between Petitioner, NUSI and the original schemers occurred in July of 1970, and a sales meeting was thereafter held on July 27, 1970. Petitioner was present at this meeting along with the business associates of Petitioner, the Reible brothers, the two witnesses sought to be deposed in the motion and order now sought to be reviewed.

From the initial meeting, however, Petitioner began questioning everything, (Tr. 438-430), since that was his first contact with an offshore fund. (Tr. 3080-3097). When on August 15, 1970, a German newspaper "Der Aktioner" publicly questioned the soundness of First Liberty Fund (Tr. 469), Petitioner contacted the originators in the United States questioning the soundness of fund and the accuracy of the news article. (Tr. 479).

Prior to trial and at his own expense, Petitioner deposed several witnesses in Europe, including Germany. During the trial when the Government's "theory of criminal culpubility" as to Petitioner was taking shape, Petitioner moved the trial court for authorization to depose the Reible brothers to gain their exculpatory testimony to aid his defense and establish his innocence. In doing so, Petitioner proffered that the proposed deponents would establish that (a) the European bank accounts to which the prosecution addressed its evidence was not under Petitioner's control but was solely controlled by the Reible brothers; (b) Petitioner had no disbursing authority at the custodian bank for First Liberty Fund for the pertinent period of time; and (c) the proposed deponent's testimony would have contradicted a substantial portion of the Gov-

ernment's case, especially the facts from which the Government urged the inference of Petitioner's alleged guilty knowledge of what was transpiring. (See Tr. 552-557).

But in response to Petitioner's motion the Government countered that the Reible brothers, being charged in the very indictment against Petitioner, were fugitives and thus excludable from deposition. In addition, the Government refused to attend any deposition of the proposed witnesses and refused to dismiss the brothers from the indictment although it knew that the brothers were not extradictable from Germany. In short, the Government prosecutors unilaterally controlled the very status of the Reible brothers which they then claimed to be the sole basis disqualifying them from submitting to deposition. The results: while the Government concededly made deals with admitted conspirators whose testimony, also concededly, circumstantially incriminated the Petitioner, the Government also unilaterally manipulated the posture of the Reible brothers so as to preclude Petitioner from employing their testimony in his defense.

Compounding this manipulative deprivation the Government, in summation, commented on Petitioner's silence by saying at various stages of its final argument:

> "Did Goldstein say, hey, stop, no more sales? Did he say 'Lets freeze the money, all money coming in and hold it for the benefit of the First Liberty Fund share holders?" No, he did not do that. (T. 122).
>
> ". . . Mr. Goldstein is trying to say that he is so naive,. . . . (Tl. 67).

> "Now, what did Mr. Goldstein and the others do. Well, they didn't tell Reigler. (Tl. 69).
>
> "Mr. Goldstein met with Mr. Mattauch before the Frankfort meeting. He never told Mr. Mattauch about First Liberty being a fraud. (Tl.69).
>
> "They never told anyone, ladies and gentlemen. (Tl. 69).
>
> "There is no evidence in this case, one way or the other, as to who had the power to sign the checks on the NUSI account at the Swiss bank corporation, and there is no evidence in this case one way or another as to what happened to the money that was in that account." (Tl. 128).

The foregoing are far from oblique comments on the *defense's* failure to call witnesses or produce evidence. By directly identifying the Petitioner, the references clearly constitute comments on a defendant's silence and adversely draw from the absence the very testimony which would have been produced by Petitioner had the Government not, unilaterally and with unbridled discretion, manipulated the Reible brothers status as co-defendants and refused to consent to their depositions.

As indicated above, the Court of Appeals for the Fifth Circuit affirmed Petitioner's conviction but makes no use of the District Court's phrase "the Reible brothers are indicted . . . (co-defendants of Goldstein) charged as defendants in many of the counts of this indictment, but are beyond the jurisdiction of this Court and the reach of the government . . . " The Court of Appeals affirms on the

ground that Petitioner "inexcusably delayed" in requesting the depositions of the Reible brothers (Appendix A) and there was no abuse of discretion in denying the Rule 15 motion made three weeks into the trial. It also affirms on the ground that the prosecutor's comments were on the failure of the defense, as opposed to the defendant, to counter or explain evidence or testimony presented, despite the fact that the prosecutor's comments specifically and exclusively identify Petitioner by name.

REASONS FOR GRANTING THE WRIT

1. Whether the trial court erred to the substantial prejudice of the Petitioner and denied him due process and equal protection of the law and the right to compulsory process over witnesses when in a conspiracy and a 41 count mail fraud prosecution it denied Petitioner's trial motion to depose two crucial defense witnesses whose testimony was demonstrably material to rebutting the conspiracy alleged against the Petitioner, and the conspiracy was the only charge of which the Petitioner was convicted?

The first question presented concerns a fundamental question of the scope of the due process, equal protection and compulsory process over witness clauses of the Constitution of the United States. The question goes to the balancing of and the interpretation of Rule 15(a) *Federal Rules of Criminal Procedure*, prior to the recent amendments, as it pertains to deposing willing but unavailable witnesses essential to the defense on the one hand, and the unbridled, unilateral prosecutorial control over the status of potential defense witnesses by making and keeping such persons "indicted co-defendants" and,

at the same time, refusing to consent to the deposition of such persons solely on the basis that they are indicted co-defendants or fugitives. This is an area of law relating to discovery and presentation of defense evidence in a criminal proceeding to which this Court has never addressed itself although in a civil case 38 years ago, this Court summarily approved as non-abusive the denial of a motion to depose witnesses filed on the eve of trial. *Tennessee Electric Power Co., v. Tennessee Valley Authority*, 306 U.S. 118 (1939). The particular emphasis taken by the Government at trial and as approved in part by the trial court — that the proposed witnesses are "indicted co-defendants" of Petitioner are thus fugitives the taking of whose depositions would amount to an injustice — also is a question to which this Court has never addressed itself. Additionally, there is an apparent conflict between the decision of the Fifth Circuit which is the subject hereof and the United States Court of Appeals for the Second Circuit as to what facts constitute "undue delay" in moving for court authorized depositions pursuant to Rule 15(a), *supra*.

Moreover, the unbridled and unilateral manipulation of the status of the proposed deponents as indicted co-defendants by the Government and its refusal to consent to their depositions prior to trial substantially contributed to the timing of Petitioner's original motion, thus compounding the injustice worked against Petitioner and all predicated on an unconstitutional preclusion of defense witnesses in contravention of the Sixth Amendment's compulsory process over witness clause. See cases up-holding defendants' constitutional right to secure willing co-defendants' exculpatory testimony by way of severance: *Byrd v. Wainwright*, 428 F.2d 1017 (5th Cir. 1970);

United States vs. Echeles, 352 F.2d 892 (7th Cir. 1965); *United States v. Shuford*, 454 F.2d 772 (4th Cir. 1971).

A. AUTOMATIC DISQUALIFICATION FROM DEPOSITION OF CO-INDICTEES IS UNCONSTITUTIONAL

This Government's trial and appellate position strongly urged the disqualification of the Reible brothers as proposed deponents solely on the basis that they were indicted — co-defendants who, by virtue of such status, were "fugitives." Although conceding that the brothers were not extraditable, the Government refused to dismiss them from the indictment which resulted in the brothers' unwillingness to appear at trial in behalf of and exculpate Petitioner. The Government urged Ninth and Second Circuit cases in support of the proposition that deposing a fugitive would amount to an injustice. These cases, however, do not control the issue and, moreover, as applied to the facts at bar run afoul of Petitioner's Sixth Amendment right to compulsory process over witnesses. See cases *op. sit.*

In *United States v. Murray, supra*, a defendant moved to depose a husband/wife pair of witnesses residing in Mexico, contending that they could and would assist in his defense in testing the authenticity and probative value of business records concededly taken from their home. But contrary to that established at the trial below, the movant made no showing that the witnesses would be unable to appear at the trial. In affirming the trial court's

[1] *United States v. Murray*, 492 F.2d 178, 195 (9th Cir. 1973)
United States v. Kelly, 349 F.2d 720, 769 (2nd Cir. 1965)
United States v. Gonzales, 488 F.2d 833 (2nd Cir. 1973)

denial of the motion in *Murray*, the Ninth Circuit also concluded from the record that it was, "quite unlikely that the Hernandez' would have provided any information helpful to Walker." *Id.*, at 195.

In *United States v. Gonzales, supra*, the Second Circuit affirmed the denial of a Rule 15(a) motion solely because the proposed deponent was not unavailable to attend the trial or prevented from attending the trial; rather the deponent was unwilling to attend the trial based upon his anticipated exposure of criminal prosecution as a co-indictee. Nevertheless, the court strongly cautioned, " . . . we believe the wiser course would have been to grant the motion . . . " citing *United States v. Hayutin*, 398 F.2d 944 (2nd Cir. 1968), *cert. denied* 393 U.S. 961 and *United States vs. Bentvena*, 319 F.2d 916, 941 (2nd Cir. 1963), *cert. denied* 375 U.S. 940. And went on to say at page 839:

> ". . . although there was substantial evidence before the trial judge identifying Fiores as the co-defendant and thus in a sense as a fugitive from justice, *we do not think that this fact is dispostive. Whatever value this type of exculpation has to the fugitive co-defendant, the defendant should not be deprived of testimony which would be available by deposition.* The testimony of a fugitive from justice is rightly suspect, but not solely because of the lack of perjury sanction. *The jury is well able to weigh such testimony and in this case it might be better to let it be taken.*" (emphasis supplied)

Indeed, to preclude Rule 15(a) depositions of co-indictees solely based upon such status also establishes an unreasonable classification since co-indictees who submit to prosecution and attend trial proceedings are readily available for and allowed to give exculpatory testimony, even if such requires severing defendants otherwise subject to joint trial. See *Byrd vs. Wainwright*, *United States v. Echeles* and *United States v. Shuford*, all *supra*.

B. THE CONFLICT AS TO THE TERM "UNDUE DELAY" IN MOVING FOR RULE 15 (a) DEPOSITION.

The Fifth Circuit expressly affirmed the trial court's denying Petitioner's motion for depositions based upon "undue delay" citing *Heflin v. United States*, 223 F.2d 371 (5th Cir. 1955); *United States v. Whiting*, 308 F.2d 537 (2nd Cir. 1962); *United States v. Broker*, 246 F.2d 328 (2nd Cir. 1957) *cert. denied* 355 U.S. 837. But both *Whiting* and *Broker* are clearly distinguishable from the case at bar and *Heflin* and the subject decision directly conflict with *United States v. Bronston*, 321 F.Supp. 1269 (S.D.N.Y. 1971).

In *Whiting* the defense moved to depose five (5) foreign nationals one month prior to trial. Unlike Petitioner's moving papers, *Whiting's* motion and affidavits both failed to allege any more than conclusory terms concerning the unavailability of the deponents and did not demonstrate the materiality of their anticipated testimony. At a hearing on the motion, Whiting's counsel declined to indicate what form his defense to the charge would take and failed to demonstrate the exculpatory nature of the sought testimony. *Id.*, at page 541. When Whiting renewed the motion on the first day of trial the district court denied it saying, ". . . his papers nowhere give one tenth of what he said on the stand today, 'even though counsel for Whiting had known this information for two-months.'"

In Petitioner's trial the defense could not learn until after the case-in-chief that the prosecution was to urge Petitioner exercised unseen and unobservable control over the businesses run and owned by the Reible brothers, whose anticipated testimony, as proffered to the court in detail, would exonorate him.

Moreover, in *United States v. Bronston*, *supra*, on facts identical to those below, a Federal court in New York determined as not unduly delayed, an identical request to depose foreign national witnesses essential to the defense. While previously in Europe two months before trial Bronston's attorney contacted "most, if not all, of the witnesses in Spain . . ." The witnesses were reportedly unwilling to travel to America to testify at trial. Fourteen days before trial Bronston moved for Rule 15(a) authority to depose the witnesses, which was granted subject to his paying essential costs.

Petitioner seeks review of a conviction of a single count of conspiracy, having run the gauntlet of 41 additional mail fraud counts and being acquitted of all of them, despite the deficiency of the evidence he presented in his defense. A deficiency prompted by the Government's objection to and the trial court's refusal to allow the depositions of crucial witnesses capable of rebutting the essential elements of culpable knowledge and conspiratorial intent. The precise basis for the government's objection (injustice

from deposing co-indictees) and the courts' refusal (deposing co-indictees and the undue delay in seeking Rule 15(a) authority) were based upon standards never considered by this Court. Meanwhile, the Court of Appeals herein concerned is trivializing the standards of "undue delay," to the extent of conflicting with another Federal court and all to the detriment of Petitioner's ability to exculpate himself from the one remaining charge vis-a-vis his constitutional right to call witnesses in his own defense. In a period when thoughtful people are seriously concerned about fundamental fairness and the non-manipulation of the criminal justice machinery, the events and rulings of which review is herein sought certainly warrant the attention of this Court.

2. Whether the trial court erred to the substantial prejudice of the Petitioner and denied him due process of law and a fair trial when it permitted the government to argue and comment in summation, over objection, that the defendant failed to testify which, when considered *in tandum* with the trial court's refusal to allow the trial depositions of the two defense witnesses pertinent to the conspiracy allegation, compounded Petitioner's disability to rebut the conspiracy charge or present an effective defense?

The prosecutor's summation is composed of a motley collection of inflammatory remarks inherently and patently calculated to comment on Petitioner's failure to personally testify, in contravention of this Court's mandate in *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, L.Ed.2d 106 (1965). The effect of the proscribed comments in summation, taken *in tandum* with the government's unilateral control over the status of the Reible brothers as "indicted

co-defendants" produced an unconscionable combination of (a) depriving the Petitioner of the very witnesses who could exculpate him and (b) thereafter commenting on the *defendant's personal* failure to explain the evidentiary deficiencies in his case.

In *Griffin*, *supra*, the following summation was held to be constitutionally, prejudicially infirm:

> "The defendant certainly knows whether Essie Mae had this beat up appearance at the time he left her apartment and went down the alley with her.
>
> "What kind of a man is it that would want to have sex with a woman that beat up if she was beat up if she was beat up at the time he left?
>
> "He would know that. He would know how she got down the alley. He would know how the blood got on the bottom of the concrete steps. He would know how her wig got off. He would know whether he beat her or mistreated her. He would know whether he walked away from that place cool as a cucumber when he saw Mr. Villasenor because he was conscious of his own guilt and wanted to get away from that damaged or injured woman.
>
> "These things he has not seen fit to take the stand and deny or explain.
>
> "And in the whole world, if anybody would know, this defendant would know.

"Essie Mae is dead, she can't tell you her side of the story. The defendant won't."

In affirming the trial court's denial of Petitioner's motion for mistrial the Circuit Court deemed the prosecutor's comments as constituting comments on the failure of the defense, not the defendant, to counter to explain. Such an attenuated interpretation of the prosecutor's utterances cannot be allowed to stand, especially when the comments singularly, specifically and expressly name the Petitioner as the party who failed to take what the government considered to be appropriate action. See *comments quoted infra.*

The evil in this procedure is plain. Petitioner seeks no more than fundamental fairness within the Federal criminal process and his petition is deserving of review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a writ of certiorari should be granted by this Court.

Respectfully Submitted,

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Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the within Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was mailed this _____ day of April, 1977 to the office of the Solicitor General, Department of Justice, Washington, D.C.

/s/ Ronald I. Strauss

RONALD I. STRAUSS,
ESQUIRE

APPENDIX

APPENDIX A

United States Court of Appeals,
Fifth Circuit.

No. 75-3362.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Miles DEARDEN, Jr., Alex Goldstein
and Leonard Nikoloric,
Defendants-Appellants.

Feb. 3, 1977.

Defendants were convicted in the United States Court for the Southern District of Florida at Ft. Lauderdale, Charles B. Fulton, J., of conspiracy to transport money obtained by fraud and other crimes involved in operation of a sham offshore mutual fund, and they appealed. The Court of Appeals, Gee, Circuit Judge, held, inter alia, that the evidence supported one defendant's conviction, that the trial court properly denied motions to sever, that it properly refused to allow depositions to be taken of foreign witnesses three weeks after trial began, and that there was no fatal variance in the conspiracy charged against another defendant.

Affirmed.

1. Conspiracy —48.1(2)

Evidence in prosecution for conspiracy to transport money obtained by fraud presented jury question as to whether defendant had knowledge of conspiracy charged. 18 U.S.C.A. § 371.

2. Criminal Law —878(3)

Defendant could be convicted of conspiracy even though he was acquitted on all substantive counts. 18 U.S.C.A. §§ 371, 1341, 1343, 2314.

3. Conspiracy —40

Once defendant is connected with conspiracy, he is responsible for acts of conspiracy occurring before or after his association. 18 U.S.C.A. § 371.

4. Criminal Law —622(2)

Admission of misdeeds by earlier coconspirators did not mandate severance of trial against defendant for conspiracy to transport money obtained by fraud. 18 U.S.C.A. § 371.

5. Depositions —9

Trial court did not abuse its discretion in refusing defendant right to take deposition of foreign witness where motion to take such deposition came three weeks into trial. Fed.Rules Crim.Proc. rules 15, 15(a), 18 U.S.C.A.

6. Criminal Law —721(1)

Test to determine if there has been improper comment on failure of defendant to testify is whether or not statement was manifestly intended or was of such character that jury would naturally and necessarily take it to be comment on failure of accused to testify.

7. Criminal Law —393(1)

Comment on failure of defense, as opposed to defendant, to counter or explain testimony presented or evidence introduced is not infringement on defendant's Fifth Amendment privilege. U.S.C.A. Const. Amend. 5.

8. Criminal Law —721(3)

Comments made by prosecution during jury argument in defendant's conspiracy trial did not constitute wrongful references to defendant's failure to testify, but rather constituted permissible references to failure of defense to present evidence. U.S.C.A. Const. Amend. 5.

9. Conspiracy —43(12)

There was no improper variance in prosecution for conspiracy to transport money obtained by fraud between single conspiracy charged and multiple conspiracies allegedly proved by introducing evidence of prior schemes of coconspirators. 18 U.S.C.A. § 371.

10. Criminal Law —622(2)

Where coconspirators of defendants in prosecution for conspiring to transport money obtained by fraud were not codefendants, and would have been just as available to testify for prosecution in separate trial involving only defendant, trial court did not abuse its discretion in denying defendant's motion to sever case from that of codefendants on grounds of possibility of transference of guilt from such coconspirators and their admitted schemes. 18 U.S.C.A. § 371.

11. Constitutional Law —268(2)

Defendant in criminal prosecution was not denied due process of law by reason of fact that his counsel was inconvenienced by having to travel eight miles from his office to cocounsel's office or United States attorney's office in order to share set of copies of documentary evidence introduced during trial.

Appeals from the United States District Court for the Southern District of Florida.

Before GEWIN, GEE and FAY, Circuit Judges.

GEE, Circuit Judge:

In late 1968, several businessmen not indicted in this case formed a sham offshore mutual fund called the First Liberty Fund; First Liberty was virtually valueless. Investments in First Liberty were guaranteed by Transcontinental Insurance Company, which was also a sham. In 1970, these businessmen engaged a German sales organization (NUSI) to sell First Liberty shares to German investors, who purchased $1.8 million worth of shares between July 1970 and February 1, 1971. Alex Goldstein was a partner in the German sales organization NUSI (his co-partners, Jurgen and Volker Reible, two German brothers, were indicted but remained in Germany beyond the jurisdiction of the trial court). Miles Dearden, Jr. bought out the originators of the First Liberty Fund and with his father became managing partner of the fund.[1] Leonard Nikoloric was a Washington, D.C. lawyer who initially became associated with First Liberty in an effort to provide financing for his own financially distressed lumber company. He was later engaged by Dearden to manage the financial affairs of First Liberty.

All three appellants were convicted of conspiracy to transport money obtained by fraud, in violation of 18 U.S.C. § 371. Dearden was also convicted on twelve substantive charges and Nikoloric on seven, of violating 18 U.S.C. §§ 1341, 1343, 2314. Goldstein received a two-year sentence on his conspiracy count; Dearden and Nikoloric received five-year sentences for conspiracy and concurrent two-year sentences for the substantive offenses.

GOLDSTEIN

I. Sufficiency of the evidence. Before a defendant can be convicted of conspiracy, the government must prove that he both had knowledge of the conspiracy and acted with an intent to further its objectives. United States v. Miller, 500 F.2d 751 (5th Cir. 1974). Appellant Goldstein admitted that a conspiracy existed but denied

[1] Miles Dearden, Sr. was convicted on numerous counts from which he does not here appeal.

knowledge of the conspiracy and denied acting with an intent to further its objectives. He portrayed himself as an innocent businessman who was also taken in by this fraud and complains on appeal of insufficient evidence connecting him to the conspiracy. The test in such a case is whether there was sufficient evidence to go to the jury. If there was, we then apply the Glasser v. United States test of whether there was "substantial evidence taking the view most favorable to the government" to support the jury's verdict. 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942).

[1, 2] Because defendant Goldstein admitted its existence, only slight evidence was needed to connect him with the established conspiracy. United States v. Wayman, 510 F.2d 1020, 1026 (5th Cir. 1975). Clearly, there was sufficient evidence to send this question to the jury, and applying the Glasser test, we find substantial evidence to support the jury's verdict. There is no merit in appellant's argument that he could not be convicted of conspiracy when he was acquitted on all substantive counts:

> If there be an agreement or confederation between two or more persons to commit an unlawful act and one or more acts are done by one or more of the coconspirators, it is immaterial whether the substantive offense is or is not consummated.

United States v. Jacobs, 451 F.2d 530, 540 (5th Cir. 1971), cert. denied, 405 U.S. 955, 92 S.Ct. 1170, 31 L.Ed.2d 231 (1972).

[3, 4] II. Denial of the motion to sever. Discretion on granting the motion to sever is firmly committed to the trial court. The test set forth in Tillman v. United States is stated as follows:

> "[C]an the jury keep separate the evidence that is relevant to each defendant and render a fair and impartial verdict as to him? If so, though the task be difficult, severance should not be granted."

406 F.2d 930, 935 (5th Cir. 1969), citing Peterson v. United States, 344 F.2d 419, 422 (5th Cir. 1965). Goldstein complains of being convicted through guilt by association with fraudulent scheming that occurred prior to his association with First Liberty. But once a defendant is connected with a conspiracy he is responsible for acts of the conspiracy occurring before or after his association. United States v. Reynolds, 511 F.2d 603 (5th Cir. 1975); United States v. Brasseaux, 509 F.2d 157 (5th Cir. 1975); Nelson v. United States, 415 F.2d 483 (5th Cir. 1969), cert. denied, 396 U.S. 1060, 90 S.Ct. 751, 24 L.Ed.2d 754 (1970). Nor does the admission of the misdeeds of earlier co-conspirators mandate a severance for this appellant. United States v. Perez, 489 F.2d 51, 67 (5th Cir. 1973). Goldstein has not alleged the kind of compelling prejudice that would cause this court to overturn the trial judge's denial of his motion to sever.

[5] III. Deposition of foreign witnesses. Federal Rule of Criminal Procedure 15(a) reads as follows:

> Whenever due to exceptional circumstances of the case it is in the interest of justice that the

> testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged, be produced at the same time and place.

In Heflin v. United States, 223 F.2d 371 (5th Cir. 1955), we held that a Rule 15 motion made five days prior to trial was properly denied for inexcusable delay.[2] Appellant's motion came three weeks into trial, after the government had completed its case-in-chief. We hold that the trial court did not abuse its discretion when it denied Goldstein's Rule 15 motion because of unexcused delay.

[6-8] IV. Comments on appellant's failure to testify. The comments complained of are set forth in the margin.[3] The Fifth Circuit test to determine if there has

[2]See also United States v. Whiting, 308 F.2d 537 (2d Cir. 1962) (holding that a Rule 15 motion filed on the first day of trial was properly denied for unexcusable delay); United States v. Broker, 246 F.2d 328 (2d Cir.), cert. denied, 355 U.S. 837, 78 S.Ct. 63, 2 L.Ed.2d 49 (1957) (holding that a motion filed on the eve of trial may be denied for unexcused delay).

[3]Did Goldstein say, hey, stop, no more sales? Did he say "Lets freeze the money, all money coming in and hold it for the benefit of the First Liberty Fund share holders?" No, he did not do that.

. . . Mr. Goldstein is trying to say that he is so naive . . . .

Now, what did Mr. Goldstein and the others do. Well, they didn't tell Reigler.

Mr. Goldstein met with Mr. Mattauch before the Frankfort meeting. He never told Mr. Mattauch about First Liberty being a fraud. They never told anyone, ladies and gentlemen.

There is no evidence in this case, one way or the other, as to who had the power to sign the checks on the NUSI account at the Swiss bank corporation, and there is no evidence in this case one way or another as to what happened to that money that was in that account.

been a comment on the failure of a defendant to testify is whether or not the statement was manifestly intended or was of such a character that a jury would naturally and necessarily take it to be a comment on the failure of the accused to testify. United States v. White, 444 F.2d 1274 (5th Cir.), cert. denied, 404 U.S. 949, 92 S.Ct. 300, 30 L.Ed.2d 266 (1971). A comment on the failure of the defense, as opposed to the defendant, to counter or explain the testimony presented or evidence introduced is not an infringement of the defendant's fifth amendment privilege. See United States v. Hill, 508 F.2d 345 (5th Cir. 1975). We conclude that all of the comments complained of here fall in the category of comments on the failure of the defense rather than comments on the failure of appellant Goldstein to testify.[4] The court instructed the jury that it could not consider appellant's failure to testify, and we find no prejudice to appellant requiring reversal of his conviction.

Appellant Goldstein's additional complaint that the government violated one of the stipulations of fact in its closing argument is without merit, and the conviction as to him is **AFFIRMED.**

[4]For a comparison of another argument held not to violate a defendant's fifth amendment privilege, see United States v. Wilson, 500 F.2d 715, 721 (5th Cir. 1974).

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-3362

D. C. Docket No. FL-74-69-CR-CF
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

MILES DEARDEN, JR., ALEX GOLDSTEIN
and LEONARD NIKOLORIC,
Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Florida

Before GEWIN, GEE and FAY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

FEBRUARY 3, 1977

ISSUED AS MANDATE: MAR. 25, 1977
(AS TO MILES DEARDEN, JR. and
ALEX GOLDSTEIN ONLY)

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

EDWARD W. WADSWORTH
Clerk

Tel. 504-589-6514
600 Camp Street
New Orleans, LA 70130

March 17, 1977

TO ALL PARTIES LISTED BELOW:

No. 75-3362 - USA v. Miles Dearden, Jr., Alex Goldstein and Leonard Nikoloric

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing,* and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition for rehearing en banc* has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By SUSAN M. G??????

/smg
cc: Mr. Theodore Klein
Mr. Ronald I. Strauss
Mr. Arnold R. Ginsberg
Mr. Barry L. Garber
Mr. Robert L. Guthrie
Mr. Robert W. Rust
Mr. Morris Silverstein
*on behalf of Nikoloric

APPENDIX C

CHAPTER 19—CONSPIRACY

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

APPENDIX D

CHAPTER 63—MAIL FRAUD

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or anything whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

As amended May 24, 1949, c. 139, § 34, 63 Stat. 94; Aug. 12, 1970, Pub.L. 91-375, § 6(j) (11), 84 Stat. 778.

APPENDIX E

Rule 15.

DEPOSITIONS

(a) When Taken. Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged, be produced at the same time and place. If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on written motion of the witness and upon notice to the parties may direct that his deposition be taken. After the deposition has been subscribed the court may discharge the witness.